

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

JOSEPH E. HOLLIMAN,
Appellant,

v.

UNITED STATES POSTAL SERVICE
Agency.

DOCKET NUMBER
PH-0752-94-0305-A-1

DATE: MAY 05 1999

John P. Gamlin, Esquire, Fort Collins, Colorado, for the appellant.

Maria R. Fuhrmann, Esquire, Chicago, Illinois, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the addendum initial decision, issued September 10, 1998, that awarded attorney fees and costs totaling \$35,256.03. For the reasons set forth below, the Board GRANTS the appellant's petition, and AFFIRMS the addendum initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The agency demoted the appellant from his position of Postmaster, EAS-22, to the position of Postmaster, EAS-11. The Board ultimately mitigated this action to a demotion to the EAS-18 level and a reassignment. *See Holliman v. U.S. Postal*

Service, 75 M.S.P.R. 372 (1997). The appellant then sought attorney fees and costs, totaling \$43,197.08. Attorney Fee Appeal File, Tab 23. The administrative judge awarded the appellant attorney fees of \$35,256.03, finding as follows:

(1) The appellant and his representative had an attorney-client relationship and the appellant incurred legal fees; (2) the appellant was a prevailing party; (3) attorney fees were warranted in the interest of justice; (4) the hourly rate requested by the appellant's attorneys and paralegal were reasonable; and (5) with the exception of four itemized requests, all of the requested billable hours and costs were reasonable.

¶3 In his petition for review, the appellant asserts that the administrative judge committed a calculation error in awarding fees totaling \$35,256.03. He asserts that subtracting the amounts the administrative judge disallowed from his \$43,197.08 request yields an award of \$38,832.87. The appellant, therefore, argues that he is entitled to an additional \$3,576.84, as well as \$839 in fees and costs for preparing his petition for review.

ANALYSIS

¶4 The Board has held that the administrative judge who adjudicated the case on the merits is in the best position to determine whether the number of hours expended on the case is reasonable, and that, absent a specific showing that the administrative judge's evaluation was incorrect, the Board will not second-guess it. *See Beall v. Department of the Interior*, 68 M.S.P.R. 231, 234 (1995). Here, the administrative judge began his analysis of the matter by finding that the hours requested by counsel are reasonable, "with certain exceptions." He then considered the reasonableness of the claimed hours and disallowed only four items. These concerned 16.7 hours at \$175 per hour for unsuccessful work on a prior petition for review, 1.9 hours at \$175 per hour for work pertaining to the U.S. Court of Appeals for the Federal Circuit, 3.4 hours at \$175 per hour for premature compliance matters, and \$514.21 for unrecoverable photocopying costs.

Addendum Initial Decision at 9-12. As the appellant correctly argues, subtracting these disallowed amounts from his \$43,197.08 attorney fee request yields an award an \$38,832.87.

¶5 The administrative judge did not detail the individual charges that he did award, but instead based his award on his compilation of requested hours for each of the attorneys and paralegals who worked on the appeal. The charges had been submitted in six individual fee motions and supplements, and the calculation was complicated by the fact that billing rates during the appeal had changed for certain of the attorneys one or two times. Thus, it is unclear exactly where the difference lies. We find, however, based on our own review of the record, the administrative judge's express statement that "with certain exceptions" (presumably those he enumerated) the requested number of hours is reasonable, and the agency's failure to respond on petition for review or to raise any objections below with specificity or beyond those the administrative judge discussed, that the remaining fees appear to be of the same type and of the same degree of necessity as those fees that were allowed. We conclude, therefore, that the appellant is entitled to the additional \$3,576.84.

¶6 The appellant has also requested \$839 in fees and costs for preparing his petition for review. This request, however, includes \$15 for photocopying costs which are not recoverable. We grant the remaining requested amount because there is no question regarding the reasonableness of these fees and costs. *See Howard v. Office of Personnel Management*, 79 M.S.P.R. 172, 174-75 (1998). Accordingly, we find that the appellant is entitled to an attorney fee award of \$39,656.87.

ORDER

¶7 We ORDER the agency to pay the attorney of record \$39,656.87 in fees. The agency must complete this action within 20 days of the date of this decision. *See generally* 5 U.S.C. § 1204(a)(2).

¶8 We also ORDER the agency to inform the appellant and the attorney of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). We ORDER the appellant and the attorney to provide all necessary information that the agency requests in furtherance of compliance. The appellant and the attorney should, if not notified, inquire as to the agency's progress. *Id.*

¶9 Within 30 days of the agency's notification of compliance, the attorney may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the attorney believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. *See* 5 C.F.R. § 1201.182(a).

¶10 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.